

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

ADJUSTACAM LLC
Plaintiff

v.

AMAZON.COM, INC. *et al.*,
Defendants

Case No. 6:10-cv-329-LED

JURY TRIAL DEMANDED

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE (DKT. 636) TO DEFENDANTS'
OBJECTIONS TO CLAIM CONSTRUCTION (DKT. 632)**

Defendants Best Buy Co. Inc., Best Buy Stores, LP, Bestbuy.Com, LLC, CDW LLC, Digital Innovations, LLC, Fry's Electronics, Inc., Gear Head, LLC, Hewlett-Packard Company, Kohls Corporation, Kohl's Illinois, Inc., Micro Electronics, Inc. d/b/a Micro Center, Newegg, Inc., Newegg.Com, Inc., Office Depot, Inc., Rosewill Inc., Sakar International, Inc., and Wal-Mart Stores, Inc., (collectively, "Defendants") hereby submit the following Reply to Plaintiff AdjustaCam, LLC's ("Plaintiff") Response (Dkt. No. 636, "Response") to Defendants' Objections to Magistrate Judge Love's Claim Construction Order (Dkt. No. 632, "Objections").

Defendants note that Plaintiff's Response is largely a rote repetition of arguments presented in its Opening Claim Construction Brief, and as such, Defendants have already addressed the bulk of Plaintiff's errors both in Defendant's Responsive Claim Construction Brief and in the Objections. Nonetheless, Plaintiff's Response introduces new legal and factual errors which render this short reply necessary. Specifically, Plaintiff errs in asserting that the clarifying construction proposed by Defendants is "untimely" or "waived." Pl. Response at 12. As explained below, Plaintiff's assertions are plainly wrong and should be disregarded.

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First, the doctrine of waiver is simply irrelevant here as a matter of law. Plaintiff cites to the Federal Circuit's opinion in *Interactive Gift Express, Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1347 (Fed. Cir. 2001), as purportedly supporting its assertion that Defendants' proposed clarifying construction for "disposition" is "untimely" and "waived." Pl. Response at 12. However, *Interactive Gift* merely addressed whether a party may appropriately change its claim construction position on appeal to the Federal Circuit without ever having raised such arguments before the District Court. 256 F.3d at 1346 (analyzing whether appellant waived its new claim construction position in light of "the basis requirement, embodied in the doctrine of waiver, that the parties develop their positions at trial"). Plaintiff fails to explain how "waiver" under *Interactive Gift* can apply where, as here, the case is ongoing and no trial on the merits, much less final judgment, has occurred.

Moreover, Plaintiff's suggestion that all modifications to claim constructions are now barred as "untimely" is contrary to long-standing judicial practice. Indeed, it is well-established that claim constructions may be modified at any time prior to final judgment. *See, e.g., Pressure Prods. Med Supplies, Inc. g. Greatbatch Ltd.*, 599 F.3d 1308, 1315-16 (Fed. Cir. 2010) (rejecting appellant's argument that modification of claim construction made during trial was improper); *Wright Asphalt Prods., Co., LLC v. Pelican Ref. Co., LLC*, 2011 U.S. Dist. LEXIS 22309, 79-80 (S. D. Tex. Mar. 7, 2011) (collecting cases). As such, Plaintiff's assertions of "untimeliness" have no basis in law or practice.

Finally, Plaintiff grossly mischaracterizes the content of Defendants' Objections to the extent Plaintiff implies, by attempting to invoke the doctrine of waiver, that Defendants have changed their claim construction position. *See* Pl. Response at 12. To the contrary, as the

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Objections make clear, Defendants’ proposed alternative construction of “disposition” merely responds to a concern raised by Magistrate Judge Love and *clarifies* the issue addressed by Defendants’ original proposed construction – namely, that divorcing rotation from what the term “disposition” means in the context of the asserted patent would produce a ludicrous result. Objections at 11-13. Indeed, the *Interactive Gift* opinion on which Plaintiff relies explicitly states that waiver would only apply where a party is introducing a new claim construction *position*, but that opinion itself observes that it does not “prevent a party from *clarifying* or defending the original scope of its claim construction.” 256 F.3d at 1346, 1347-48 (“Thus, only arguments that *change the scope* of [appellant’s] claim construction positions... will be deemed to be waived”) (emphasis added). Plaintiff’s suggestion that Defendants’ alternative construction is improper merely because the wording differs from the original proposed construction simply misses the mark. The alternative construction clarifies, but does not change the scope, of the construction Defendants originally proposed.

In sum, for the foregoing reasons and for the reasons set out in Defendants’ Objections, Defendants respectfully request that the Court disregard Plaintiff’s baseless arguments and overrule the construction of the term “disposition.”

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DATED: May 18, 2012

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this notice was served on all counsel who have consented to electronic service, Local Rule CV-5(a)(3)(A), on this the 18th day of May, 2012.

/s/ Steven R. Daniels

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